



4310-05-P

## **DEPARTMENT OF THE INTERIOR**

### **Office of Surface Mining Reclamation and Enforcement**

#### **30 CFR Part 935**

**[SATS No. OH-255-FOR; Docket No. OSM-2013-0012;  
S1D1SSS08011000SX066A000178S180110;  
S2D2SSS08011000SX066A00017XS501520]**

#### **Ohio Regulatory Program**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Final rule; approval of amendment with two exceptions.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) is approving, with two exceptions, an amendment to the Ohio regulatory program (the Ohio program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Ohio's submission demonstrates its intent to revise its program by amending the Ohio Reclamation Commission's (the Commission) procedural rules. By submission of the amended procedural rules, found within Ohio Administrative Code (OAC) at sections 1513-3-01 through 1513-3-22, Ohio proposed to revise the Ohio program pursuant to the additional flexibility afforded by the revised Federal regulations at 30 CFR 732.17, and SMCRA, as amended. As a

result of review of the Ohio program, the proposed amendment, and an opportunity for public comments, OSMRE has determined that the majority of the submittal is no less stringent than SMCRA and no less effective than the corresponding regulations. The two revisions not approved by OSMRE are found within OAC at section 1513-3-07(A), which relates to intervention. OSMRE's rationale for not approving these proposed revisions is explained in depth below.

**DATES:** *Effective Date:* [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mr. Ben Owens, Chief, Pittsburgh Field Division, OSMRE, Three Parkway Center, 2nd Floor, Pittsburgh, Pennsylvania 15220. Telephone: (412) 937-2827. Email: bowens@osmre.gov.

**SUPPLEMENTARY INFORMATION:**

- I. Background on the Ohio Program
- II. Submission of the Amendment
- III. OSMRE's Findings
- IV. Summary and Disposition of Comments
- V. OSMRE's Decision
- VI. Procedural Determinations

## **I. Background on the Ohio Program**

Section 503(a) of SMCRA allows a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, state laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Ohio program effective August 16, 1982. Notice of the conditional approval of Ohio's permanent regulatory program was published in the Federal Register on August 10, 1982 (47 FR 34688). You can also find later actions concerning Ohio's program and program amendments at 30 CFR 935.11, 935.15, and 935.30.

## **II. Submission of the Proposed Amendment**

For background purposes, the Commission is an adjudicatory board established pursuant to Ohio Revised Code (ORC) section 1513.05. The Commission is the office to which administrative appeals may be filed by any person claiming to be aggrieved or adversely affected by a decision of the Ohio Department of Natural Resources, Chief of the Division of Mineral Resources Management (DMRM), relating to mining and reclamation issues. Following an adjudicatory hearing, the Commission affirms, vacates, or modifies the DMRM Chief's decision. The Commission is comprised of eight members appointed by the Governor of Ohio. Members represent a variety of interests relevant to mining and reclamation issues. The Commission

adopts rules to govern its procedures. The Commission's rules are found at OAC section 1513-3-01 through 1513-3-22 and are the subject of the current amendment to the Ohio program. By letter dated November 6, 2013, Ohio submitted an amendment to its program, (Administrative Record No. OH-2192-01). Ohio's submittal was prompted by requirements within the Ohio statute that all state agencies must review their administrative rules every five years. Consistent with this requirement, the Commission revised its rules to ensure an orderly, efficient, and effective appeal process. By submitting the amendment to OSMRE, Ohio exercised its ability to revise the Ohio program pursuant to the additional flexibility afforded by the revised Federal regulations at 30 CFR 732.17, and SMCRA, as amended, to improve operational efficiency of the Ohio program and to ensure Ohio's proposed provisions are consistent, and in accordance, with SMCRA and are no less effective than the corresponding Federal regulations

OSMRE announced receipt of the proposed amendment in the May 20, 2014, Federal Register (79 FR 28854). In the same document, OSMRE opened the public comment period and provided an opportunity for a public hearing or meeting.

OSMRE did not hold a public hearing or meeting, as neither were requested. The public comment period closed on June 19, 2014. OSMRE did not receive any comments.

### **III. Summary of the Ohio Amendment and OSMRE's Findings on the Amendment**

Following is a summary of various provisions of the amendment that Ohio submitted, as well as OSMRE's findings on whether those provisions are consistent, and in accordance, with SMCRA and are no less effective than the Federal regulations at 30 CFR 732.15 and 732.17. As described below, OSMRE is approving the amendment with the exception of two provisions in the proposed rule, one at section 1513-3-07(A), relating to the intervention of a party, and the other at 1513-3-07(D)(4), relating to the effect of intervention. Any revisions that we do not specifically discuss below concern non-substantive wording or editorial changes.

### *1513-3-01 Definitions*

These changes clarify existing definitions and provide additional definitions. Specifically, the definition of "appellant" is clarified to explicitly state that actions of the DMRM Chief are subject to appeal to the Commission. The definition of "final order" clarifies that the resolution of matters presented on appeal will be in writing and consistent with section 1513-3-19 of the OAC. The definition of "full party" is added. This definition will define "full party" to include the appellant, the appellee, and any intervenor participating in an appeal as defined by the OAC at section 1513-3-07 entitled, "Intervention." Additionally, the term, "interested persons in an appeal pending before the Commission" is added. This term, as approved, defines interested person as the appellant, the appellee, any intervenors, or and any other persons who have notified the Commission of an interest in a pending appeal and have requested to be notified of hearings in said appeal. The definition of "intervenor" is modified to remove the word "one" and replace it with the term, "any person." The definition of "person" is modified to encompass limited liability companies. Within the definition of "regular business hours" the terms "chairman" and

“vice-chairman” are replaced by “chairperson” and “vice-chairperson,” respectively. The remaining modifications renumber the terms to facilitate the addition of new terms.

*OSMRE Finding:* We have determined that the definitions of “appellant,” “final order,” “full party,” “interested persons in an appeal pending before the Commission,” and “regular business hours” do not have Federal counterparts. However, they are not inconsistent with SMCRA or the Federal regulations. Therefore, we approve these definitions. The revised definition of “intervenor” remains consistent with its Federal counterpart at 43 CFR 4.1110 and is therefore approved. There is no direct Federal counterpart to the revised portion of Ohio’s definition of “person,” as the Federal counterpart does not specifically include limited liability companies. However, the Federal definition does include corporations and partnerships; limited liability companies are essentially amalgams of those two business structures. Therefore, the change to the State’s definition does not render it inconsistent with the Federal regulations at 30 CFR 700.5, and we are approving the change.

#### *1513-3-02 Internal Regulations*

Paragraph (B) of Section 1513-3-02, which is entitled, “Quorum,” is modified to clarify the conditions for satisfying quorum requirements. Four members of the Commission must be present to qualify as a quorum, and an action by the Commission is not valid unless at least four members concur.

Additionally, the rule clarifies the procedure in the event concurrence is not reached. As amended, four members must agree that concurrence is not met. Further, when concurrence is

not met, the existing record of proceedings is to be submitted to all members of the Commission who did not attend any portion of the proceedings. These members may determine if they wish to participate in the appeal. Following review of the record, they must participate in the rendering of a decision. The provision for a tied vote is eliminated.

The amendment provides that, in the event that a concurrence cannot be reached, a decision must be rendered stating such and an Order must be issued affirming the action of the DMRM Chief under review.

Furthermore, the rule clarifies that in the event a Commission member considered as part of the quorum misses any part of the proceeding, he or she must review the record before participating in the rendering of a decision. Audio-electronic hearings before the Commission constitute the official record of the hearing. However, other methods of creating the official record are permitted upon the Commission's discretion, by joint motion of the parties, or by motion of a party and subsequent approval by the Commission. Additionally, the issuance and service of subpoenas must comply with the Ohio Rules of Civil Procedure, and, as applicable, section 119.094 of the ORC, including its requirement that a fee must be paid to witnesses outside the county in which a hearing must be held.

*OSMRE Finding:* We have determined that the provisions in this section do not have direct Federal counterparts. However, they are not inconsistent with the Federal regulations at 43 CFR 4.2, which governs, generally, membership of administrative boards and decisions of those boards. Therefore, we approve the proposed changes to OAC 1513-3-02.

### *1513-3-03 Appearance and Practice Before the Commission*

The rule clarifies that any party may appear on their own behalf or may be represented by an attorney at law admitted to practice according to Ohio law. This includes the admittance of attorneys *pro hac vice*.

*OSMRE Finding:* We have determined that the provisions in this section are consistent with the Federal regulations at 43 CFR 1.3 and 4.3, which govern, respectively, who may practice in Departmental administrative proceedings, and representation before appeals boards. Therefore, we approve the changes to OAC 1513-3-03.

### *1513-3-04 Appeals to the Reclamation Commission*

Although the majority of the changes to this section are clerical and non-substantive, the rule clarifies that email addresses, if available, should be included in the notice of appeal.

Additionally, appellants must include a copy of the written notice, order or decision of the DMRM Chief to be reviewed. Appellants are required to comply with the requirements of section 1513.02 of the ORC, pertaining to the power and duties of the DMRM Chief, and must include and forward the amount of any penalty for placement in a penalty fund. The rule adds a section describing information that the appellant may include in the notice of appeal. Appellants may, but are not required to, identify the area to which the notice, Order, or decision relates; state whether or not the Commission is requested to view the site; and state whether or not the appellant waives the right to have the hearing within the time frames established in section



1513.13(B), Appeal of notice of violation, order or decision to reclamation commission of the ORC.

When filing a notice of appeal pertaining to the review of a decision to approve or disapprove a permit application, an appellant must comply with section 1513.07, Coal mining and reclamation permit of the ORC, and must file the notice of appeal within 30 days of notice of the DMRM Chief's determination.

It is further clarified that a notice of appeal is deemed filed when complete notice has been provided. Further, a notice of appeal may be amended without leave of the Commission during the time allowed for original filing. However, amendment of a notice of appeal may not be employed to cure jurisdictional defects in the filing following the close of this time period. Following the close of this time period, a notice of appeal may be amended by leave of the Commission.

*OSMRE Finding:* We have determined that the provisions in this section are consistent with the Federal regulations governing the varying types of administrative appeals of decisions of OSMRE. These regulations are at 43 CFR 4.1107, 4.1115, 4.1153, 4.1164, 4.1184, 4.1263, 4.1282, 4.1303, 4.1363, 4.1372, and 4.1382. Therefore, we approve the changes to OAC 1513-3-04.

#### *1513-3-05 Filing and Service of Papers*

This section of the rule clarifies that the filing of a notice of appeal must conform to section

1513.13 of the ORC, Appeal to the Commission. The rule alters the definition of when a notice of appeal is deemed filed. The proposed amendment states that a notice of appeal will be deemed filed when received or if the notice of appeal is sent by certified mail, registered mail, or express mail, it will be deemed filed on the date of the postmark placed upon the sender's receipt by the postal service. However, documents requesting temporary relief are deemed filed when received by the Commission. Additionally, all filings other than a notice of appeal or a request for temporary relief, that are not sent to the Commission by certified mail, registered mail, or express mail will be deemed filed with the Commission on the day on which the filings are received, and those that are sent by such means, will be deemed filed on the postmark date placed upon the sender's receipt by the postal service. Further, following initiation of an appeal, the Commission may, through order, establish a filing and service protocol, which may include the electronic transmission of documents.

*OSMRE Finding:* We have determined that the provisions in this section are consistent with the Federal regulations at 43 CFR 4.1107, which governs the filing of documents, and 43 CFR 4.1109, which governs service of documents. Therefore, we approve the changes to OAC 1513-3-05.

#### *1513-3-06 Computation and Extension of Time*

The majority of the changes to this section are non-substantive and consist of renumbering for clarity. However, section (C)(1) is altered to definitively read that the Commission may not lengthen or reduce the time period allowed for any response to, or filing of, a request for temporary relief.

*OSMRE Finding:* We have determined that the provisions in this section do not have direct Federal counterparts. However, they are not inconsistent with the Federal regulations at 43 CFR 4.1261 and 4.1264, which govern, respectively, applications for temporary relief and responses thereto. Therefore, we approve the changes to OAC 1513-3-06.

#### *1513-3-07 Intervention*

Ohio submitted a revision to this rule to require that any person seeking leave to intervene in an appeal before the Commission must do so within ten days prior to the beginning of an evidentiary hearing on the merits of an appeal, unless waived by the Commission for extraordinary cause. OSMRE is not approving this section of the amendment as it is inconsistent with the corresponding provisions of the Federal regulations found at 43 CFR 4.1110(a). The Federal counterpart allows any person, including a State or OSMRE, to petition to intervene at any stage of a proceeding. The provision proposed by Ohio prejudices a potential intervenor by imposing time limits on petitions to intervene. Although the proposed revision would allow intervention after the ten days preceding an evidentiary hearing, upon waiver by the Commission, the potential intervenor must still demonstrate extraordinary cause. This additional hurdle is not imposed by the Federal counterpart. Therefore, OSMRE is not approving the following sentence in section 1513-3-07(A), of the proposed amendment: “A petition for leave to intervene must be filed at least ten days prior to the beginning of an evidentiary hearing on the merits of an appeal, unless waived by the commission for extraordinary cause.”

Also, the deletion of 1513-3-07(D)(4) is less effective than the Federal regulations found at 43 CFR 4.1110. This deletion would prevent the Commission from considering the effect of intervention on the agency's ability to implement its statutory mandates. However, the Federal regulation at 43 CFR 4.1110(d)(4) explicitly allows the IBLA to consider this effect in deciding whether intervention is appropriate. The deletion of this provision in the OAC would render the Ohio program less effective by preventing its statutory mandate from receiving due consideration in Commission decisions on intervention. Therefore, OSMRE is not approving the deletion of OAC 1513-3-07(D)(4).

There is only one other substantive amendment to this section. The change, at section 1513-13-07(F), will allow the filing of amicus briefs and oral argument at hearing by amicus curiae upon leave by, and at the discretion of, the Commission. This provision does not have direct Federal counterparts. However, it is not inconsistent with relevant sections of 43 CFR part 4. Therefore, this provision of OAC 1513-3-07 is approved.

#### *1513-3-08 Temporary Relief*

The amendments to this section are non-substantive and primarily consist of language to make references gender neutral. Therefore, the amendments are approved.

#### *1513-3-10 Discovery*

Previous discovery rules are amended to clarify parties to an appeal may obtain discovery in

accordance with the provisions of rules 26 through 36 of the Ohio Rules of Civil Procedure.

Additionally, the rule explains that all parties, including intervenors, are subject to discovery and that discovery from non-parties must be done through subpoena. In the event a party fails to obey an order to compel or permit discovery issued by the Commission, the Commission may make such orders in regard to the failure as it deems just.

*OSMRE Finding:* We have determined that the provisions in this section are consistent with the Federal regulations at 43 CFR 4.1130 through 4.1141. Therefore, we approve the changes to OAC 1513-3-10.

#### *1513-3-11 Motions*

This revision moves the provision at section (B), which allows a party to make a written motion requesting a hearing to be conducted before the full Commission, rather than before a hearing officer for the Commission, to section 1513-3-18, Reports and recommendations of the hearing officer. The revision to this section also provides that objections to jurisdiction are non-waivable and may be raised at any point in an appeal, consistent with the Ohio Rules of Civil Procedure.

*OSMRE Finding:* We have determined that the provisions in this section do not have direct Federal counterparts. However, they are not inconsistent with the Federal regulations at 43 CFR 4.1112. Therefore, we approve OAC 1513-3-11.

#### *1513-3-12 Pre-Hearing Procedures*

This revision allows the Commission or its hearing officer, at its own initiative, or at the request of any party, to schedule and hold pre-hearing conferences on issues on appeal.

*OSMRE Response:* We have determined that the proposed change to this section is consistent with 43 CFR 4.1121(b). Therefore, we are approving the change to OAC 1513-3-12.

#### *1513-3-14 Site Views and Location of Hearings*

This rule specifies the locations of Commission hearings. It also clarifies the circumstances in which the Commission will conduct site views of mining operations, reclamation operations, or other relevant features. The rule also explicitly states that the Commission will control and direct the manner of conducting a site view. Specifically, where a site view is conducted on property subject to a mining and reclamation permit, parties must be informed prior to the site view of any necessary personal protective equipment, including hard hat, safety glasses, hearing protection, safety-toed shoes or boots and additional equipment that may be required on mine property as determined by the mine operator. Additionally, the Commission reserves the right to limit the number of persons who participate in the site view. Additionally, a hearing related to a cessation of mining or a motion for temporary relief must be held in proximity to the subject area of the hearing for the convenience of the Commission and the parties. All other proceedings will continue to be held in Columbus, Ohio, or at any convenient public location selected by the Commission.

*OSMRE Response:* We have determined that the provision regarding the location for hearings related to temporary relief, has no direct Federal counterpart, but is not inconsistent with the Federal regulation found at 43 CFR 4.1106, which governs location of hearing sites, generally.

The Federal regulation states that the administrative law judge must consider convenience of the parties in determining the hearing site. The remaining provisions in this section do not have Federal counterparts. However, they are not inconsistent with SMCRA or its implementing regulations. Therefore, we are approving the changes to OAC 1513-3-14.

#### *1513-3-15 Consolidation of Proceedings*

The Commission is given discretion to administer consolidated appeals in the manner it deems most appropriate.

*OSMRE Response:* We have determined that the provision in this section is consistent with the Federal regulation at 43 CFR 4.1113, which grants the administrative law judge the authority to consolidate proceedings. Therefore, we are approving OAC 1513-3-15.

#### *1513-3-16 Conduct of Evidentiary Hearings*

This rule applies to any person participating in an appeal before the Commission and definitively states that the Commission will determine the conduct of the hearing and the order of the presentation of evidence. Additionally, it further clarifies that the Commission is not bound by the formal rules of evidence as promulgated by the Ohio Supreme Court. The rule also establishes a procedure for in-camera inspection of documents claimed to contain proprietary business information or trade secrets. Additionally, the rule specifically details the number of copies of proposed exhibits a party must make available. The rule also adds a provision to clarify that a continuing objection is sufficient to preserve objection to an area of evidence. In

regard to written testimony, affidavits may be admitted only if the evidence is otherwise admissible and all full parties agree that affidavits may be used in lieu of oral testimony. This alteration is limiting as it adds the adjective “full,” thus excluding certain parties. Parties wishing to use affidavits in lieu of oral testimony must serve all full parties with a copy of the affidavit at least 15 days before a hearing. It is clarified that in the event a declarant is unavailable, testimony may be offered in compliance with rule 804 of the Ohio Rules of Evidence. As proposed, objections to deposition testimony must be resolved in accordance with rule 32 of the Ohio Rules of Civil Procedure. Further, in instances when a party is attempting to use written testimony, any full party must present the Commission a schedule of objections to the written testimony prior to the commencement of the hearing. This is a change to the former rule that allowed objection at the hearing following receipt of the testimony into evidence. Regarding the presentation of witnesses, the Commission may require that a witness be called only once during a hearing and that the parties conduct all examinations at the time when the witness is called to testify. An Ohio notary may be given authority to administer oaths and affirmations to witnesses. Further, the Commission is given authority to require the parties to submit written closing arguments, post-hearing briefs, or proposed findings of fact and conclusions of law.

*OSMRE Finding:* We have determined that the provisions in this section are not inconsistent with the Federal regulations found at 43 CFR 4.1120 – 4.1129. Therefore, we are approving the changes to OAC 1513-3-16.

#### *1513-3-17 Voluntary Dismissal and Settlement*

The adjective “full” is added to section (B), relative to agreement to settle. This addition limits



settlements to those where all parties (i.e., appellant, appellee, and intervenor, if any) agree to do so. In the event an appeal is settled during the course of a hearing, the parties must enter into the record a statement acknowledging that they have reached an agreement that all issues have been resolved, and that a withdrawal of the appeal will be filed.

*OSMRE Finding:* We have determined that the provisions in this section are consistent with the Federal regulations at 43 CFR 4.1111. Therefore, we are approving the changes to OAC 1513-3-17.

#### *1513-3-18 Reports and Recommendations of the Hearing Officer*

Section 1513-3-11(B), discussed above, is inserted in this section. This section allows a party to make a written motion requesting that a hearing be conducted before the full Commission, rather than before a hearing officer for the Commission.

The existing regulations required Reports and Recommendations of hearing officers to be submitted to the Commission within a time reasonably sufficient to allow the Commission to issue timely Orders. This amendment incorporates a proviso to that rule that in the event a decision before a hearing officer must be rendered within a specified time period, the appeal will be heard by the Commission, rather than by a hearing officer, unless there has been a waiver of the right to an expedited hearing.

*OSMRE Findings:* We have determined that the provisions in this section do not have direct Federal counterparts. However, these provisions are not inconsistent with the Federal regulations at 43 CFR 4.1120 through 4.1129. Therefore, we are approving the changes to OAC

1513-3-18.

*1513-3-19 Decisions of the Commission*

This rule clarifies the procedures the Commission will follow when issuing decisions.

Additionally, the rule allows the remission, within 30 days after issuing a final decision, of pre-paid civil penalties, where penalties are under appeal. The rule also provides more detailed information about the procedures that will be followed if errors are found in Commission decisions. Specifically, during the time period after a final decision has been issued by the Commission, clerical mistakes in the final decision and errors therein from oversight or omission may be corrected before an appeal of the Commission's final decision is filed. Thereafter, while an appeal is pending before an appellate court, a final decision may be so corrected with leave of the court. However, the correction of a clerical mistake or error in a final decision does not extend the time for filing a notice of appeal in the appellate court. Further, this rule extends the time the Commission may remit, transfer, or accept payment of an increased penalty assessment amount from fifteen days to thirty days.

*OSMRE Finding:* We have determined that most of the provisions in this section do not have direct Federal counterparts. However, these provisions are not inconsistent with SMCRA or its implementing regulations, nor inconsistent with Departmental hearings and appeals regulations found at 43 CFR part 4, subparts B and L. Moreover, the amendments pertaining to civil penalties are consistent with the Federal regulations at 43 CFR 4.1157. Therefore, we are approving the changes to OAC 1513-3-19.

### *1513-3-20 Costs*

The former “Costs” section is rescinded. Previously, this section allowed the Commission to assess costs against a party to an appeal. The Commission does not, *sua sponte*, assess such costs, and the rule has not been used by the Commission. Moreover, filing fees are not required for Commission appeals. Additionally, the award of costs and expenses, following petition, are addressed fully in the following section, *Awards of Costs and Expenses*.

*OSMRE Findings:* We have determined that the provisions removed by rescission of this section are replaced by the provisions described in OAC 1513-3-21. As discussed in the *OSMRE Findings* for OAC 1513-3-21, we have determined that the provisions in the latter section are not inconsistent with SMCRA or regulations at 43 CFR part 4, subparts B and L. Therefore, OSMRE determines the rescission of this section does not render the Ohio program inconsistent with the Federal regulations at 43 CFR 4.1290 through 4.1296, and the rescission is approved.

### *1513-3-21 Award of Costs and Expenses*

This rule clarifies the previous version of this rule approved by OSMRE in 2010. *See* 75 FR 72947, allowing for the recovery of costs and expenses, including attorneys’ fees to certain parties. The amendment clarifies that the Commission is also authorized to hear petitions for costs, including attorneys’ fees and expenses, where petitions are filed by the DMRM and allege bad faith or harassment by another party. These petitions must conform to section 1513.13 of the ORC. Petitions must be filed within 60 days of receipt of the final decision of the Commission in the action in which the fees were incurred. Petitions by the DMRM must include an affidavit

detailing all costs and expenses, receipts, and when attorneys' fees are requested, evidence that the hours expended and the fees requested are reasonable for the appeal and for the locality. A person served with a copy of a petition for costs and expenses must file an answer thereto within 30 days. Awards of attorney fees are appealable consistent with the ORC. This rule clarifies that parties may receive awards of costs and expenses, including attorneys' fees, expert witness fees, and fees reasonably incurred as a result of proceedings before the Commission, and specifies that fees incurred in seeking fees may also be awarded.

However, the rule at 1513-3-21(D) clarifies that Ohio's statute and regulations relevant to minerals—not including coal or peat, found within Chapter 1514 of the Revised Code, do not include an award of costs and expenses provision similar to those required in Chapter 1513. Specifically, Ohio's rule references the provision found within section 1514.09 that specifically explains that attorneys' fees, costs, and expenses may not be recovered for minerals. Chapter 1514 is not required to be consistent with SMCRA or its implementing regulations, as it does not pertain to coal regulation. Because Chapter 1514 is not part of the approved Ohio program, OSMRE is not making a determination on this portion of the Ohio rule.

*OSMRE Findings:* We have determined that the provisions in this section are no less effective than the Federal regulations at 43 CFR 4.1290 – 4.1296. Therefore, we approve the changes to OAC 1513-3-21.

#### *1513-3-22 Appeals from Commission Decisions*

This rule clarifies that parties to actions involving coal mining and reclamation brought under

section 1513 of the ORC may seek review of a Commission decision in the court of appeals for the county in which the activity addressed by the decision of the Commission occurred, is occurring, or will occur. Moreover, this rule clarifies that parties to actions involving industrial minerals mining and reclamation and brought under section 1514.09, Representation on commission for appeals, of the ORC may seek review of a Commission decision in the court of common pleas in the county where the operation addressed by the decision of the Commission is located, or in the Franklin County Court of Common Pleas. However, Chapter 1514 is not required to be consistent with SMCRA or its implementing regulations, as it does not pertain to coal regulation. Because Chapter 1514 is not part of the approved Ohio program, OSMRE is not making a determination on this portion of the Ohio rule.

Additionally, the rules provide the Commission with the authority to control the transcription and transmission of the record to the appropriate appellate court.

*OSMRE Findings:* We have determined that the provisions in this section are consistent with Section 526 (a)(2) of SMCRA (30 U.S.C. 1276(a)(2)), and with the Federal regulations at 30 CFR 775.13(b) and 43 CFR 4.1369. Therefore, we are approving the changes to OAC 1513-3-22.

#### **IV. Summary and Disposition of Comments**

##### Public Comments

OSMRE asked for public comments in the May 20, 2014, **Federal Register** (79 FR 28854)

(Administrative Record No. OH-2192-04). OSMRE did not receive any public comments or a request to hold a public meeting or public hearing.

#### Federal Agency Comments

Under Federal regulations at 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, OSMRE requested comments on the amendment from various Federal agencies with an actual or potential interest in the Ohio program (Administrative Record No. OH-2192-02). Specifically, OSMRE solicited comment from the Advisory Council on Historic Preservation, the United States Department of Labor, the United States Fish and Wildlife Service, the United States Environmental Protection Agency (EPA), the Ohio Historic Preservation Office, and the United States Department of Agriculture. OSMRE did not receive any response to the request for comments.

#### Environmental Protection Agency Concurrence and Comments

Pursuant to the Federal regulations at 30 CFR 732.17(h)(11)(ii), OSMRE is required to get a written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

None of the revisions that Ohio proposed in the submittal pertain to air or water quality

standards. Therefore, we did not ask EPA to concur on the amendment, and as stated above, EPA did not provide comment.

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. OSMRE requested comments on the Ohio amendment (Administrative Record Number OH-2192-02). We did not receive any comments.

**V. OSMRE's Decision**

Based on the above findings, we approve the amendment Ohio sent us on November 6, 2013, (Administrative Record Number OH-2192-01) with the exception of two provisions. We are not approving the sentence in section 1513-3-07(A), as explained above: "A petition for leave to intervene must be filed at least ten days prior to the beginning of an evidentiary hearing on the merits of an appeal, unless waived by the commission for extraordinary cause." We are also not approving the deletion of 1513-3-07(D) (4), as explained above: "The effect of intervention on the agency's implementation of its statutory mandate."

To implement this decision, we are amending the Federal regulations at 30 CFR Part 935 that codify decisions concerning the Ohio program. In accordance with the Administrative Procedure

Act, this rule will take effect 30 days after the date of publication. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. SMCRA requires consistency of State and Federal standards.



## **VI. Procedural Determinations**

### Executive Order 12630 - Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations. Other changes implemented through this final rule notice are administrative in nature and have no takings implications.

### Executive Order 12866 - Regulatory Planning and Review

Pursuant to Office of Management and Budget (OMB) Guidance dated October 12, 1993, the approval of state program amendments is exempted from OMB review under Executive Order 12866.

### Executive Order 12988 - Civil Justice Reform

The Department of the Interior has reviewed this rule as required by section 3(a) of Executive Order 12988. The Department determined that this Federal Register notice meets the criteria of Section 3 of Executive Order 12988, which is intended to ensure that the agency review its legislation and proposed regulations to eliminate drafting errors and ambiguity; that the agency write its legislation and regulations to minimize litigation; and that the agency's legislation and regulations provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Because Section 3 focuses on the quality of Federal legislation and regulations, the Department limited its review under this Executive Order

to the quality of this Federal Register notice and to changes to the Federal regulations. The review under this Executive Order did not extend to the language of the State regulatory program or to the program amendment that the State of Ohio drafted.

#### Executive Order 13132 - Federalism

This rule is not a “[p]olicy that [has] Federalism implications” as defined by section 1(a) of Executive Order 13132 because it does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Instead, this rule approves an amendment to the Ohio program submitted and drafted by that State. OSMRE reviewed the submission with fundamental federalism principles in mind as set forth in sections 2 and 3 of the Executive Order and with the principles of cooperative federalism set forth in SMCRA. See, e.g., 30 U.S.C. 1201(f). As such, pursuant to section 503(a)(1) and (7) (30 U.S.C. 1253(a)(1) and (7)), OSMRE reviewed the program amendment to ensure that it is “in accordance with” the requirements of SMCRA is “consistent with” the regulations issued by the Secretary pursuant to SMCRA.

#### Executive Order 13175 - Consultation and Coordination with Indian Tribal Government

In accordance with Executive Order 13175, OSMRE has evaluated the potential effects of this rule on Federally recognized Indian tribes and has determined that the rule does not have substantial direct effects on one or more Indian tribes, or the relationship between the Federal

government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. The basis for this determination is that our decision pertains to the Ohio regulatory program and does not involve a Federal program involving Indian lands or Indian tribes in any way.

#### Executive Order 13211 - Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

Executive Order 13211 of May 18, 2001, which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

#### National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions, including amendments thereto, do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)). It is further documented in the DOI Departmental Manual at 516 DM 13.5 that agency decisions on approval of State regulatory programs do not constitute major Federal actions.

### Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

### Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Ohio's submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon data and assumptions for the counterpart Federal regulations.

### Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) does not have an annual effect on the economy of \$100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, geographic regions, or Federal, State, or local government agencies; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This

determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

#### Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 935

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 13, 2018.

Thomas Shope, Regional Director

Appalachian Region

For the reasons set out in the preamble, 30 CFR part 935 is amended as set forth below:

## **PART 935 – OHIO**

1. The authority citation for part 935 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

2. Section 935.12 is added to read as follows:

### **§ 935.12 State statutory, regulatory, and proposed program amendments not approved.**

(a) In OAC 1513-3-07(A), we are not approving the following sentence: “A petition for leave to intervene must be filed at least ten days prior to the beginning of an evidentiary hearing on the merits of an appeal, unless waived by the commission for extraordinary cause.”

(b) In OAC 1513-3-07(D) (4), we are not approving the deletion of the following sentence: “The effect of intervention on the agency’s implementation of its statutory mandate.”

3. Section 935.15 is amended in the table by adding a new entry in chronological order by “Date of final publication” to read as follows:

### **§ 935.15 Approval of Ohio regulatory program amendments.**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
* * * * *		
November 6, 2013	<b><u>[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]</u></b>	OAC 1513-3-01 through 1513-3-22, except for a portion of OAC 1513-3-07(A) and the deletion of OAC 1513-3-07(D)(4).

[FR Doc. 2018-18706 Filed: 8/28/2018 8:45 am; Publication Date: 8/29/2018]